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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF WASHINGTON

11 NATIONAL CENTER FOR PUBLIC
POLICY RESEARCH,

12 Plaintiff,

13 v.

14 HOWARD SCHULTZ, STARBUCKS
CORPORATION, KEVIN JOHNSON,
JOHN CULVER, RACHEL RUGGERI,
TED ADAMS, TYSON AVERY, KELLY
BENGSTON, BRADY BREWER, DENNIS
15 BROCKMAN, GEORGE DOWDIE, JEN
FRISCH, SHANNON GARCIA, RACHEL
GONZALEZ, ZABRINA JENKINS, A.J.
16 JONES, II, SARA KELLY, JENNIFER
KRAFT, ANGELA LIS, CARL MOUNT,
17 DENISE NELSEN, ANJU RAO, KYNDRA
RUSSELL, DEBBIE STROUD, ROSANN
WILLIAMS, GINA WOODS, MELLODY
18 HOBSON, RICHARD E. ALLISON, JR.,
ANDREW CAMPION, MARY N.
DILLON, ISABEL GE MAHE, JORGEN
19 VIG KNUDSTORP, SATYA NADELLA,
JOSHUA COOPER RAMO, CLARA
20 SHIH, AND JAVIER G. TERUEL,

21 Defendants.

Case No. 2:22-CV-00267-SAB

**DEFENDANT STARBUCKS
CORPORATION'S REPLY IN
SUPPORT OF MOTION TO
DISMISS COMPLAINT**

STARBUCKS CORPORATION'S
REPLY ISO MOTION TO DISMISS

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INTRODUCTION

Plaintiff NCPPR, a group engaged in combatting what it characterizes as “the evils” of “corporate America’s ‘woke’ embrace” of Diversity, Equity, and Inclusion (“DEI”) and an owner of a mere 56 shares of Starbucks stock, has brought this shareholder derivative lawsuit—suits disfavored and only allowed in exceptional circumstances—to supplant the business judgments of Starbucks Board of Directors with its own anti-DEI public policy agenda. Despite purporting to bring this lawsuit on behalf and for the benefit of Starbucks, it is readily apparent from Plaintiff’s public statements and the allegations in its Complaint that Plaintiff views Starbucks as merely a pawn in Plaintiff’s anti-DEI game of chess, a pawn it would gladly sacrifice, to the detriment of the Company and its shareholders, in order to advance its broader objectives. Plaintiff, therefore, cannot fairly and adequately represent the interests of Starbucks or its shareholders. Plaintiff also cannot plead with particularity that Plaintiff’s Demand was wrongfully refused. Plaintiff’s Response cannot explain away these fatal deficiencies, which cannot be cured by amendment. The Complaint should be dismissed with prejudice.

I. PLAINTIFF IS NOT A FAIR OR ADEQUATE REPRESENTATIVE

The Response does not contest that shareholder derivative actions “are disfavored and may be brought only in exceptional circumstances,” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash. 2d 107, 147, 744 P.2d 1032 (1987), and

1 that Plaintiff cannot maintain this lawsuit if it “does not fairly and adequately”
 2 represent the interests of Starbucks and its shareholders. Rule 23.1. The Response
 3 also does not contest the factors the Court should consider in determining whether
 4 Plaintiff satisfies Rule 23.1(a)’s standard. Mot. at 8-9. And other than arguing that
 5 Plaintiff’s animus towards Starbucks, its Board, and management is less than the
 6 plaintiff’s animus towards the defendant in *Smith v. Ayers*, 977 F.2d 946 (5th Cir.
 7 1992), the Response makes no effort to address, let alone distinguish, the Company’s
 8 cited authorities. Mot. at 8-17 (citing numerous authorities). The Court, therefore,
 9 need only determine whether these factors show that Plaintiff is likely to disregard
 10 the interests of Starbucks and its other shareholders in order to advance Plaintiff’s
 11 own ulterior motive—an admitted nationwide campaign against corporate America
 12 on matters of DEI in which this lawsuit, among “a series of lawsuits” against many
 13 corporations, is merely a “tool” in “an ever-growing arsenal of tools, strategies and
 14 allies[.]” Exhibit 6 to the Supplemental Jensen Declaration (“Ex. _”) at 3, 5.

15 ***Plaintiff’s Anti-DEI Crusade Is More Important to It Than Starbucks.***

16 Plaintiff incredibly argues that it has brought this lawsuit “to protect the value of its
 17 [56 shares of] Starbucks stock[.]” Resp. at 7. Plaintiff’s public statements, Mot. at 5,
 18 11-13, however, reveal that Plaintiff is not motivated by what is best for Starbucks
 19 or its shareholders, but by a broad anti-DEI agenda. Indeed, Plaintiff said the quiet
 20 part out loud when it stated that lawsuits like this one are merely “tool[s]” among

1 many it intends to use to combat corporate DEI, Ex. 6 at 3, 5, that “companies are
 2 only going to come to their senses after a raft of lawsuits reminds them,” *id.* at 10-
 3 11, and that such lawsuits, even if nominally brought on behalf of a corporation, are
 4 designed to encourage the “plaintiff’s bar” to file additional lawsuits against
 5 companies like Starbucks and precipitate “significant settlements,” *id.* at 36.

6 Plaintiff’s professed goals, for which this lawsuit is designed to assist, are to
 7 prevent “managerial socialism,” *id.* at 5, the “selling [of] great masses of white
 8 people and men into penury and powerlessness,” *id.*, and a “corrupt, decrepit,
 9 poverty-stricken socialist dystopia animated by identity-group competition for the
 10 scraps remaining after the rewards for hard work and high achievement have been
 11 eliminated[,]” *id.* at 9. What is best for Starbucks, or what is “value-maximiz[ing]”
 12 for Plaintiff’s 56 shares of Starbucks stock, Resp. at 6, is not motivating Plaintiff
 13 when it views itself as fighting a high-stakes culture war against corporate America.

14 ***Plaintiff Is Too Vindictive to Represent Starbucks Interests.*** Plaintiff argues
 15 that the Company has placed its own “editorial gloss” on Plaintiff’s purpose and
 16 overstated Plaintiff’s animus towards Defendants, *id.* at 6-8, and attempts to
 17 distinguish this case from *Smith*, as if the family feud-related facts in that case
 18 establishes the minimum level of animus required to disqualify a shareholder from
 19 representing the interests of a corporation. *Id.* But it is Plaintiff’s own words and
 20 actions, not some editorial gloss, that shows Plaintiff’s vindictiveness.

1 Plaintiff argues that unlike the plaintiff in *Smith*, it has not used epithets like
 2 “satanic” or “evil” in describing Defendants. Resp. at 6-7. Not so. Plaintiff has
 3 decried the so-called “evils of woke politicized capital and companies . . . committed
 4 to critical race theory and the socialist foundations of woke,” characterized the
 5 Chairman and CEO of Blackrock, a major investor in Starbucks, as a “real-life Bond
 6 villain” for his support for DEI, and described corporate directors and executives
 7 like the Individual Defendants as “shameless monsters who are willing to sacrifice
 8 our futures to their comforts[.]” Ex. 4 at 3. Plaintiff also has labeled these directors
 9 and executives as “indoctrinated” and “committed” to “repugnant” theories, Ex. 6 at
 10 10-11, 36, bent on ushering in a dystopian nightmare, *id.* at 9. While individual
 11 investors may have “viewpoints that may not align with the company’s position on
 12 political, religious, or social matters[,] . . . stockholders invest with the understanding
 13 that the board is empowered to direct the corporation’s affairs.” *Simeone v. The Walt*
 14 *Disney Company*, 2023 WL 4208481, at *25 (Del. Ch. June 27, 2023).¹

15 Even more so than in *Smith*, here the Court “should beware allowing a
 16 derivative suit to proceed where the ‘representative could conceivably use the
 17 derivative action as ‘leverage’ in other litigation[.]” 977 F.2d at 949. As shown

18
 19 ¹ Plaintiff also argues that the instant litigation does not involve “a series of
 20 precursors” like *Smith*. Resp. at 6. But Plaintiff ignores that it has put forward three
 shareholder proposals, Mot. at 5-6, all soundly rejected by shareholders, and has
 encouraged Starbucks shareholders to vote against every Starbucks director up for
 re-election. *See* Ex. 4 at 4.

1 above, not only could Plaintiff use this action as leverage, it has stated that such
2 leverage is the very reason it brought this case.

3 ***Plaintiff's Remedy Would Harm the Company.*** Plaintiff characterizes its
4 Complaint as merely “noticing” a “problem” (Plaintiff’s inaccurate and conclusory
5 allegation that the Company’s Initiatives are illegal) and seeking to “halt” the
6 “ongoing harm” caused by it. Resp. at 2. Noticing an alleged problem is a far cry
7 from filing a lawsuit seeking declaratory judgments that the Initiatives are illegal.
8 Such judgments would only advance Plaintiff’s public policy agenda and encourage
9 employment actions against Starbucks; they would be inimical to the Company’s
10 interests, particularly when there has been no adjudication that these Initiatives are
11 illegal. Mot. at 14-16. Derivative lawsuits are brought on behalf of a corporation,
12 and should be designed to help, not hurt, it.

13 ***Plaintiff Lacks Support from the Company's Shareholders.*** Plaintiff
14 discounts the views of two shareholders owning 167 million shares of Starbucks
15 stock (14% of the Company’s outstanding stock) because they cannot purport to
16 speak on behalf of all other shareholders. Resp. at 10-12. The Company never argued
17 that they did. However, case law uncontested by Plaintiff states that a court “may
18 properly consider the degree of support a would-be shareholder plaintiff will receive
19 from other shareholders in determining the adequacy of representation under Rule
20 23.1.” Mot. at 16 (quoting authority). At this juncture, what we know is that

1 Plaintiff's 56 shares are opposed to, and 167 million shares appear to be in favor of,
 2 the Company's Initiatives. What we also know is that Plaintiff has put forward three
 3 DEI-related shareholder proposals that were resoundingly rejected by the
 4 Company's shareholders, including one that challenged the Company's racial-bias
 5 education. Mot. at 5-6, 17. A direct challenge to these Initiatives is not required to
 6 ascertain the likely views of Starbucks shareholders on such matters.

7 For each of these reasons, Plaintiff does not fairly and adequately represent
 8 the interests of Starbucks, as required by Rule 23.1(a), and should not be permitted
 9 to maintain this action on behalf of the Company.

10 **II. THE COMPLAINT FAILS TO ALLEGE WRONGFUL REFUSAL OF 11 THE DEMAND WITH PARTICULARITY**

12 Rule 12(b)(6) does not govern this Motion; Rule 23.1 does. Resp. at 3-4. To
 13 satisfy Rule 23.1(b)(3), Plaintiff must "state with particularity: (A) any effort by the
 14 plaintiff to obtain the desired action from the directors . . . and (B) the reasons for
 15 not obtaining the action or not making the effort." And contrary to Plaintiff's
 16 suggestion, Resp. at 4, this particularity requirement is not just applicable in federal
 17 court. The relevant parts of Washington Superior Court Civil Rule ("CR") 23.1 are
 18 substantively identical to those in its federal counterpart.² Under both rules, Plaintiff
 19 falls far short of pleading wrongful refusal with particularity.

20 ² See CR 23.1 ("The complaint shall also allege with particularity the efforts, if
 any, made by the plaintiff to obtain the action the plaintiff desires from the directors

1 ***Plaintiff Misunderstands Rule 23.1(b)(3) and RCW 23B.07.400(2).*** While
 2 Plaintiff correctly states that pre-suit demand upon a corporation’s board of directors
 3 is the preferred course, *In re F5 Networks, Inc.*, 166 Wash. 2d 229, 236-40, 207 P.3d
 4 433 (2009), Plaintiff incorrectly reads the statute and misunderstands how courts
 5 must examine a demand refusal complaint. Resp. at 12-13. Under Rule
 6 23.1(b)(3)(A), Plaintiff must plead with particularity the demand for action it made
 7 upon the Starbucks Board. Under Rule 23.1(b)(3)(B), Plaintiff must also plead with
 8 particularity “the reasons for not obtaining the action,” *i.e.*, the refusal and why it
 9 was wrongful. *See Lucas v. Lewis*, 428 F. App’x 694, 695-96 (9th Cir. 2011).

10 It is well-settled that the ““only issues to be decided”” in analyzing a board’s
 11 refusal of a demand are ““the good faith and reasonableness of the board’s
 12 investigation of the claims articulated in the demand.”” *Myers v. Alstead*, 2017 WL
 13 3872408, at *5 (W.D. Wash. Sept. 5, 2017) (quoting *City of Orlando Police Pension*
 14 *Fund v. Page*, 970 F. Supp. 2d 1022, 1028 (N.D. Cal. 2013)); *see also Barovic v.*
 15 *Ballmer*, 72 F. Supp. 3d 1210, 1214-15 (W.D. Wash. 2014) (“[v]itally, ‘the court’s
 16 inquiry is not into the substantive decision of the board, but rather is into the
 17 procedures employed by the board in making its determination.’”). By electing to
 18 make a demand, a shareholder concedes the disinterestedness and independence of
 19
 20
 or comparable authority...and the reasons for the plaintiff’s failure to obtain the
 action or for not making the effort.”); *see also* RCW 23B.07.400 (similar).

1 the board to respond. *See Turgeman ex rel. Orexigen Therapeutics, Inc. v. Narachi*,
 2 2017 WL 1198902, at *5 (S.D. Cal. Mar. 31, 2017); *Sommers ex rel. FLIR Sys., Inc.*
 3 *v. Lewis*, 641 F. Supp. 2d 1151, 1156 (D. Or. 2009); *Spiegel v. Buntrock*, 571 A.2d
 4 767, 775 (Del. 1990). Plaintiff does not like the law on this point (it cites no
 5 countervailing authority), but it is well-established. It was applied by Judge Jones in
 6 the Western District of Washington in another wrongful refusal case against
 7 Starbucks six years ago when he stated that his review of the Board's decision to
 8 refuse a demand was governed by the business judgment rule, a rebuttable
 9 presumption that the board's refusal was made "on an informed basis, in good faith
 10 and in the honest belief that the action taken was in the best interests of the
 11 company." *Myers*, 2017 WL 3872408, at *4 (citing authority).

12 ***The Board's Refusal of Plaintiff's Demand Was Not Wrongful.*** The
 13 Complaint is devoid of any allegation that the Board's refusal of Plaintiff's Demand
 14 was wrongful. It does not allege that the Board was not well-informed, acted in bad
 15 faith, or that its process was in any way inadequate. Mot. at 6-7, 18-20; Jensen Decl.,
 16 ECF No. 22, Ex. 1 (detailing Board's investigation). Nor could it. Only after careful
 17 consideration did the Board decide that it was not in the best interests of Starbucks
 18 to accept the Demand and retract the Initiatives. *Id.* Its business judgment should be
 19 respected. *Myers*, 2017 WL 3872408, at *4.

1 Like the Complaint, the Response also does not challenge the Board’s process,
 2 only its conclusion to refuse Plaintiff’s Demand. Resp. at 14-17. A disagreement
 3 with a board’s decision is not enough to set it aside. *Barovic*, 72 F. Supp. 3d at 1214-
 4 15. While Plaintiff believes the Initiatives are illegal and should be retracted, the
 5 Board disagreed after thorough review and careful consideration. As stated in the
 6 Board’s July 21, 2022 refusal letter, the Board’s investigation included a review of
 7 the “current state of potentially applicable law, and analysis of the [Initiatives] in
 8 light of the law on which adverse discrimination claims might be grounded.” Mot.
 9 at 7; Jensen Decl. Ex. 1; Individual Defendants’ Motion, ECF No. 20, at 13-14.³
 10 Plaintiff essentially argues that no matter how thorough and well-informed, honest
 11 and conscientious, educated and mindful of competing opinions as to the legality of
 12

13 ³ The Supreme Court’s recent decision in *Students for Fair Admissions, Inc. v.*
 14 *Presidents and Fellows of Harvard College* and *Students for Fair Admissions, Inc.*
 15 *v. University of North Carolina*, 2023 WL 4239254 (U.S. June 29, 2023), does
 16 nothing to change this. As EEOC Chair Charlotte A. Burrows has stated, the decision
 17 “does not address employer efforts to foster diverse and inclusive workforces [and]
 18 it remains lawful for employers to implement diversity, equity, inclusion, and
 19 accessibility programs[.]” U.S. Equal Employment Opportunity Commission,
 20 Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on
 College Affirmative Action Programs, [https://www.eeoc.gov/newsroom/statement-
 eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action](https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action).
 Indeed, the majority opinion in *SFFA* is limited to race-based affirmative action in
 college admissions at institutions receiving federal funding (making them indirect
 government actors). 2023 WL 4239254, at *8, 23. It did not address DEI initiatives
 of non-governmental employers (including employer efforts to foster diverse and
 inclusive workforces) or Title VII of the Civil Rights Act.

1 a challenged corporate practice, a board's business judgment to reject a demand and
 2 retain the corporate practice must be set aside if the shareholder plaintiff persists in
 3 his belief that it is illegal.⁴ If this were so, every wrongful refusal complaint alleging
 4 an underlying illegal act would survive a Rule 23.1 motion.⁵

5 **III. THE COMPLAINT CANNOT BE CURED BY AMENDMENT**

6 No amount of artful pleading can transform Plaintiff into a fair and adequate
 7 representative. *See supra* at Section I; Mot. at 8-17. And no amendment can turn the
 8 Board's informed, reasonable, and good faith refusal of Plaintiff's Demand into a
 9 wrongful one. *See supra* at Section II; Mot. at 17-20.

10 **CONCLUSION**

11 The Complaint should be dismissed with prejudice.

13 ⁴ Even if *SFFA* changed over fifty years of Title VII jurisprudence (it did not), the
 14 Board's rejection of Plaintiff's Demand was reasonable at the time it was made,
 15 which was based on the then-state of the law. *See Zucker v. Hassell*, 2016 WL
 16 7011351, at *2 (Del. Ch. Nov. 30, 2016), *aff'd*, 165 A.3d 288 (Del. 2017); *see also*
Khanna v. McMinn, 2006 WL 1388744, at *26 n.203 (Del. Ch. May 9, 2006) (courts
 "cannot permit the *ex post* results of a decision to cloud analysis of a board's *ex ante*
 judgment").

17 ⁵ Plaintiff's cases are inapposite. Neither involved derivative claims or a board's
 18 business judgment to refuse a shareholder demand. *Durand v. HIMC Corp.*, 151
 19 Wash. App. 818, 836, 214 P.3d 189 (Wash. App. 2009), involved a direct employee
 20 action. *Bangerter v. Hat Island Cmty. Ass'n*, 2002 Wash. LEXIS 118, *24-25 (Wash.
 2022), involved an HOA, and Plaintiff cites from the dissent. While the *Bangerter*
 majority declined to decide whether the business judgment rule applies to HOAs, it
 stated that "courts do owe appropriate deference to their reasonable discretionary
 decisions." *Id.* at 192.

1 Dated: July 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 13th day of July, 2023, I caused a copy of Defendant Starbucks Corporation's Reply in Support of Motion to Dismiss Complaint to be electronically filed with the Clerk of the Court using the CM/ECF system, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

Dated: July 13, 2023

s/ Gregory L. Watts
Gregory L. Watts, WSBA #43995